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No. 82-5360

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IN THE MATTER OF LEGISLATIVE
DISTRICTING OF THE STATE

RICHARD L. ANDREWS,

Appellant,

v.

GOVERNOR OF MARYLAND,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS OR AFFIRM

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Question Presented

Does a legislative reapportionment plan invidiously discriminate against Blacks or Republicans simply because it creates some multimember districts?

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SUPREME COURT OF THE UNITED STATES

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In The Matter Of Legislative
Districting Of The State

RICHARD L. ANDREWS,

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v.

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Appellee

MOTION TO DISMISS OR AFFIRM

The State, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves the Court to dismiss the appeal herein, or, in the alternative, to affirm the judgment of the Court of Appeals of Maryland on the ground that the question presented is too insubstantial to merit further argument.

OPINIONS BELOW

The unreported Per Curiam Order of the Court of Appeals of Maryland dated June 4, 1982, and the unreported Report of the Special Master appointed by the Court of Appeals of Maryland dated May 12, 1982, is printed in the Appendix of Andrews' Jurisdictional Statement at A-1 to A-2 and A-3 to A-31, respectively. As this is an original proceeding in the Court of Appeals of Maryland, there are no further opinions or orders.

JURSIDICTION

Andrews erroneously asserts that the jurisdiction of this Court is invoked under 28 U.S.C. §1257(2). It is the position of the State that jurisdiction only arises pursuant to 28 U.S.C. §1257(3) and that review is by way of certiorari. Therefore, the State requests this Court to treat this appeal as a petition for writ of certiorari pursuant to 28 U.S.C. §2103, and to treat this Motion as a Brief in Opposition.

LAW INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States is printed in Appendix A of this Motion. Sections 1 through 5 of Article III of the Maryland Constitution are printed in Appendix A of this Motion. The portions of the Legislative District Plan for the State of Maryland directly at issue here are printed in the Appendix of Andrews' Jurisdictional Statement at A-35 to A-41.

STATEMENT OF THE CASE

Under the terms of Article III, Section 1 of the Constitution of Maryland, the legislative powers of the State are vested in a bicameral legislature called the General Assembly of Maryand. The upper house, or Senate, has a membership of forty-seven; the lower house, or House of Delegates, has one hundred forty-one members. Md. Const., Art. III, Sec. 2. Section 3 of Article III provides that the State shall be divided into forty-seven legislative districts, with one Senator and three Delegates elected from each district.

The current legislative districting plan traces its origins to the plan proposed by the Governor's Advisory Committee on Reapportionment. The Committee was charged with receiving public comment in order to better formulate a State legislative reapportionment plan and a congressional redistricting plan for the Governor.

The Advisory Committee held numerous public hearings between May 17, 1981 and December 8, 1981 in formulating its redistricting recommendations, 213 persons testified at these hearings. On December 8, 1981, the Committee made its recommendations to the Governor, who subsequently held two public hearings: one on December 21, 1981, at which 24 witnesses spoke, and one on December 23, 1981, at which 46 witnesses testified. After considering the testimony, the Governor adopted the majority of the Committee's recommendations. J.S. App. at A-3 to A-5.

On the first day of the 1982 Session of the General Assembly, pursuant to Article III, Section 5 of the Maryland Constitution, the Governor's Plan was introduced as House Joint Resolution 15 and Senate Joint Resolution 10. A slightly modified version of this

Plan, including technical corrections, was introduced as House Joint Resolution 32. Lengthy hearings were held before the Senate Constitutional and Public Law Committee and the House Constitutional and Administrative Law Committee. After the General Assembly approved House Joint Resolution 32 (hereinafter the Legislative Plan) on February 26, 1982, it became law in accordance with Article III, Section 5 of the Constitution of Maryland.

Responding to original proceedings instituted by Andrews and other registered voters, pursuant to Section 5 of Article III of the Constitution of Maryland, the Maryland Court of Appeals directed the hearings be conducted by a retired judge of the Court of Special Appeals, sitting as a special master.

Andrews alleged that Legislative Districts 42 and 44 violated the Maryland Constitutional requirement that districts be compact. Md. Const., Art. III, Sec. 4. It was further asserted that the Legislative Plan for Baltimore City, Legislative Districts 39 through 47, by the use of multimember at large legislative districts, diminished the proportionate representation of

Blacks and Republicans. J.S. App. at A-22. To cure these alleged defects, Andrews proposed a plan which would have created 27 single member subdistricts - three within each of the nine legislative districts.

The Special Master held an evidentiary hearing on April 14, 1982, and heard oral argument on April 28, 1982. On May 12, 1982, the Special Master issued his report and findings, rejecting, inter alia, Andrews' challenge and suggested plan. Subsequently, on June 1, 1982, the Court of Appeals of Maryland heard oral argument in support of or in opposition to the Report submitted by the Special Master. These proceedings before the Court of Appeals culminated in the per curiam order of June 4, 1982, which rejected all challenges to the Legislative Plan.

The primary election of September 14, 1982 was conducted in accordance with the per curiam order of June 4, 1982 and the Legislative Plan as adopted by the General Assembly of Maryland.

ARGUMENT

A Legislative Reapportionment Plan Does Not Invidiously Discriminate Against Blacks Or Republicans Simply Because It Creates Some Multimember Districts.

Andrews' sole claim that the use of multimember districts *per se* violates the Fourteenth Amendment, has been unequivocably rejected by this Court in a long line of cases. See *e.g.*, *City of Mobile v. Bolden*, 446 U.S. 55 (1980); *White v. Regester*, 412 U.S. 755 (1973); *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *Kilgarlin v. Hill*, 386 U.S. 120 (1967); *Burns v. Richardson*, 384 U.S. 73 (1966); *Fortson v. Dorsey*, 379 U.S. 433 (1965).

Moreover, this Court, most recently in *Rogers v. Lodge*, _____ U.S. _____, 102 S.Ct. 3272 (1982), has clearly indicated that a claim of dilution of minority voting strength can be successful only if it is proved that: (1) the districting has the *effect* of making the political process leading to nomination and election less open to the minority group *and* (2) the plan was motivated by a discriminatory *purpose*. See also *City of*

Mobile v. Bolden, supra, 446 U.S. at 62, 66.[1]

Andrews has not and did not even meet the first requirement of proof in a racial dilution case, i.e., he did not produce any evidence that the Legislative Plan has the effect -- without regard to purpose -- of diluting the voting rights of a racial minority. Andrews apparently believes that the mere future possibility that Blacks or Republicans may not elect delegates in proportion to their respective populations somehow invalidates the Legislative Plan. However, it is well settled that past failure at the polls, let alone speculative future failure does not establish discriminatory effect, much less discriminatory intent.[2] City of

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[1] Andrews also asserts that the use of multimember delegate districts somehow discriminates against Blacks in violation of the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. §§1971 and 1973 et. seq. (1970)), as amended by Act of June 29, 1982, Pub. L. No. 97-205, 96 Stat. 131. However, the State of Maryland is not subject to all provisions of the Voting Rights Act; its past electoral processes have not been tainted by discrimination. Moreover, as demonstrated in text Andrews did not produce any proof that they challenged apportionment plan had a discriminatory effect, let alone purpose.

[2] In contrast to Andrews' lack of evidence, the State proved that voter registration records for the selected areas in which Andrews indicated an interest revealed Republicans were in a (cont.)

Mobile v. Bolden, supra, 446 U.S. at 66 ("[I]t is not enough to show that the group allegedly discriminated against has not elected representatives in proportion to its numbers."); White v. Regester, supra, 412 U.S. at 765-766; Whitcomb v. Chavis, supra, 403 U.S. at 149-150.

CONCLUSION

Accordingly, the State respectfully submits that the question upon which this cause depends is so unsubstantial as not to need further argument, and respectfully moves this Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause, by the Court of Appeals of Maryland.

Respectfully submitted,

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distinct minority and thus generally unable to elect Republican candidates. Moreover, the State's evidence below clearly demonstrated that the goal of the participants in the redistricting process was to, and did, increase the voting strengths of blacks in Baltimore City.

APPENDIX A

Pertinent Constitutional Provisions

Constitution of the United States

Amendment XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of Maryland

Article III.

Section 1. Legislature to consist of two branches; to be styled General Assembly.

The Legislature shall consist of two distinct branches; a Senate and a House of Delegates, and shall be styled the General Assembly of Maryland.

Section 2. Membership of Senate and House of Dele gates.

The membership of the Senate shall consist of forty-seven (47) Senators. The membership of the House of Delegates shall consist of one hundred forty-one (141) Delegates.

Section 3. Division of State into legislative Districts; number of Senators and Delegates from each district; subdivision of districts.

The State shall be divided by law into legislative districts for the election of members of the Senate and the House of Delegates. Each legislative district shall contain one (1) Senator and three (3) Delegates. Nothing herein shall prohibit the subdivision of any one or more of the legislative districts for the purpose of electing members of the House of Delegates into three (3) single-member delegate districts or one (1) single-menber delegate district and one (1) multimember delegate district.

Section 4. Requirements for districts.

Each legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population. Due regard shall be given to natural boundaries and the boundaries of political subdivisions.

Section 5. Legislative districting and apportionment following each decennial census.

Following each decennial census of the United States and after public hearings, the Governor shall prepare a plan setting forth the boundaries of the legislative districts for electing of the members of the Senate and the House of Delegates.

The Governor shall present the plan to the President of the Senate and the Speaker of the House of Delegates who shall introduce the Governor's plan as a joint resolution to the General Assembly, not later than the first day of its regular session in the second year following every census, and the Governor may call a special session for the presentation of his plan prior to the regular session. The plan shall conform to Sections 2, 3 and 4 of this Article. Following each decennnial census the General Assembly may by joint resolution adopt a plan setting forth the boundaries of the legislative districts for the election of members of the Senate and the House of Delegates, which plan shall conform to Sections 2, 3 and 4 of this Article. If a plan has been adopted by the General Assembly by the 45th day after

the opening of the regular session of the General Assembly in the second year following every census, the plan adopted by the General Assembly shall become law. If no plan has been adopted by the General Assembly for these purposes by the 45th day after the opening of the regular session of the General Assembly in the second year following every census, the Governor's plan presented to the General Assembly shall become law.

Upon petition of any registered voter, the Court of Appeals shall have original jurisdiction to review the legislative districting of the State and may grant appropriate relief, if it finds that the districting of the State is not consistent with requirements of either the Constitution of the United States of America, or the Constitution of Maryland.